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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945.

No. 428.

EL DORADO OIL COMPANY AND EL DORADO TERMINAL COMPANY, Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION CORPORATION, ET AL., Appellees.

Appeal from the District Court of the United States for the Northern District of California.

On Further Hearing

BRIEF FOR THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., Appellees.

J. Carter Fort,
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Counsel for Appellees.

Washington, D. C.
March 18, 1946

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GENERAL AMERICAN TRANSPORTATION CORPORATION, ET AL., *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

On Further Hearing

BRIEF FOR THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY, ET AL., Appellees.

Foreword

This brief is filed on behalf of The Alabama Great Southern Railroad Company, et al., the rail carriers who were respondents in the proceeding before the Interstate Commerce Commission (*Allowances for Privately Owned Tank Cars*, 258 I. C. C. 371) and intervened as defendants in the court below. By motion to affirm, appellees United States of America and Interstate Commerce Commission challenged the jurisdiction of the District Court and moved for affirmance upon substantially the grounds stated in the

opinion of that Court as the basis of its action in dismissing the suit. 59 Fed. Supp. 738. After hearing argument on the jurisdictional point, this Court set the case down for further argument on the merits on the assumption that the District Court has jurisdiction.

Accordingly, this brief will be directed to the validity of the Commission's action which is here under attack. It will be confined in the main to emphasis upon certain factors which, in the view of the rail carrier appellees, demonstrate the importance as well as the propriety of sustaining the Commission's order.

I.

The Action of the Commission Was In Accordance With An Established Principle Of The Administrative Law Of Railroad Regulation.

These appellees have no direct pecuniary interest in the action in assumpsit to which the proceedings before the Commission here involved were ancillary. See *General American Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U. S. 422, 60 S. Ct. 325, 84 L. Ed. 361. They recognize, however, that the findings and conclusions of the Commission which are incorporated in the order here under attack embody an established principle of the administrative law of railroad regulation which has resulted in the elimination of serious abuses in connection with the use of private cars in railroad transportation. They are greatly concerned that no backward step now be taken which would make it impossible for the Commission to protect the practice of using private cars from abuses which have existed in the past.

The conclusions, findings and order of the Commission were set forth as follows in its report (*Allowances for Privately Owned Tank Cars, supra*, at pp. 380-1):

"We therefore conclude and find:

"(1) That the rental paid or to be paid by El Dorado

Oil Works to General American Tank Car Corporation under the terms of the lease agreement between those parties, dated September 28, 1933, was the only cost incurred by the former in furnishing the tank cars in which its shipments moved. A just and reasonable allowance as a maximum to have been paid by the respondents, rail carrier or carriers to the Oil Works for the furnishing of such cars would have been an amount not to exceed such rental. Such an amount and allowance has been paid to the Oil Works through credits made to the account of the Oil Works by the Tank Car Corporation.

"(2) That an allowance to the Oil Works by the respondents, rail carrier or carriers, or by the Tank Car Corporation, under the agreement; in excess of said rental would be unjust and unreasonable, and would unduly prefer the Oil Works as a shipper of its commodities transported by it in the tank cars here involved. The amount paid by the Tank Car Corporation to the Oil Works prior to July 1, 1934, under the terms of the agreement, to the extent it was in excess of the rentals due thereunder, was unjust and unreasonable, and unduly preferred the Oil Works as a shipper of its commodities.

"(3) That the Oil Works is entitled to no allowance from the respondents, rail carrier or carriers, directly or through the Tank Car Corporation, for the special cleaning and preparation of the tank cars during the period of the agreement, January 1, 1934, to December 31, 1936.

"An order will be entered discontinuing this proceeding."

As early as 1903, in its Seventeenth Annual Report, at pages 22-26, the Commission discussed "The evils resulting from the use of private cars" and observed with respect to privately owned stock cars that

"To insure the use of these stock cars by leading shippers—who are often prominent packers—it is charged to have been the practice of the concerns owning such cars to divide with the shippers the mileage received from the railroad companies, a practice which operated to the same effect as the payment of rebates

to such shippers, thus placing their smaller competitors at an unfair disadvantage." (p. 24).

The unlawfulness of the practices by which shipper lessees of private cars were enabled to reap substantial profits out of mileage allowances paid by the carriers to the car owners was declared in unmistakable terms in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, 382-3. The Commission there held

> "that the payment in whole or in part to shippers, including meat packers, of mileage earnings by railroads either direct or through car owners in excess of the amount of rental said shippers pay for the use of the cars and other actual expenses in connection therewith results in such shippers receiving transportation of their products at lower rates than those paid by shippers generally who use cars furnished by the carriers and at less than the published rates."

Although the findings there made related only to privately owned refrigerator cars, it was definitely stated that "the general principles enunciated apply equally to all types of private cars" (p. 382).

As recently as November 1, 1940, in its Fifty-Fourth Annual Report, the Commission called attention to the unlawfulness of the practice here involved. The following language is taken from page 74 of that report:

> "Other instances of the granting of concessions to shippers were revealed by investigations of the methods employed by private car companies in connection with the leasing by them to shippers of equipment which those shippers furnished to railroads for transportation of their own shipments. The car companies paid to the shippers, out of the mileage allowances which the former received from the railroads, greater amounts than the rentals paid to them by the shippers for the use of the equipment, and thus put the shippers in a position where they received transportation of their goods at less than the lawful rate."

Thus, the doctrine which controlled the report and order of the Commission which is here under attack—that a shipper who leases private cars in which his shipments move shall not be permitted to receive payments for the use of such cars, either directly from the railroads or through the car owner, in excess of the cost to him of furnishing the cars—has been for many years an integral part of the settled administrative law of railroad regulation. The practices of the private car companies and shippers have been conformed to this doctrine, as is indicated by the fact that since the decision in *Use of Privately Owned Refrigerator Cars, supra*, in 1934 the General American Transportation Corporation has made no payments in excess of car rental to any shipper using its cars.

II.

This Court Has Ruled That The Lawfulness Of The Practice Here Involved Is An Administrative Question To Be Determined By The Commission.

In *General American Tank Car Corporation* v. *El Dorado Terminal Company, supra*, the case which gave rise to the proceeding before the Commission, this Court definitely and clearly ruled that the question as to the lawfulness of arrangements between shippers and private car owners under which shippers may be enabled to reap substantial profits out of the allowances paid by the railroads to the car owners is an administrative question to be determined by the Commission. Not only did the Court hold that the controversy there before it involved an administrative question which could be determined only by the Interstate Commerce Commission, but it clearly identified that administrative question. It pointed out that the courts could not proceed further until the Commission had passed upon "the validity" of the payments provided for by the contract between the shipper and the car owner in so far as such payments exceeded the car rentals.

After explaining that the District Court had reached the conclusion that such excess payments would be unlawful

and that the Circuit Court of Appeals had reached the opposite conclusion, this Court said at page 428:

> "We hold that the District Court had jurisdiction but that, upon disclosure of the terms and operation of the lease contract, it should not have proceeded to adjudicate the rights and liabilities of the parties in the absence of a decision by the Commission with respect to the validity of the practice involved in the light of the provisions of the Interstate Commerce Act."

Again at page 433, the Court said:

> "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but, as in Mitchell Coal Co. v. Pennsylvania R. Co., supra, the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner may have will be saved to it."

It is significant that this Court not only defined the administrative question in this explicit language but, further, expressed its approval of the Commission's determination of a similar question in *Use of Privately Owned Refrigerator Cars, supra.* In this regard the Court said at pages 431-432:

> "If it should appear that, with respect to the tank cars in question, the shipper-lessee is making substantial profits on leased cars, by reason of the excess of the mileage allowances over the rentals paid, it might in the light of all the facts be found that the shipper is, in the result, obtaining transportation at a lower cost than others who use cars assigned them by the carriers or their own cars. The Commission has found that, in the case of refrigerator cars, held under similar leases, this has been the case, (Use of Privately Owned Refrigerator Cars, 201 I. C. C. 323). The inquiry into the lawfulness of the practice is one peculiarly within the competence of the Commission."

III.

The Commission Properly Limited Its Inquiry and Decision to the Propriety of Payments to Appellants, as Shipper-Lessees, in Excess of the Cost to Them of Furnishing Cars.

Basing their arguments entirely upon general language in the earlier part of this Court's opinion in *General American Tank Car Corporation v. El Dorado Terminal Company, supra*, appellants contend that the Commission could not direct its inquiry to the practices of the El Dorado company and General American under their lease contract but was required to institute a general investigation for the purpose of prescribing a mileage allowance for all shippers to be published in the railroad tariffs. Aside from the fact that an order fixing a general mileage allowance to be published in railroad tariffs could operate only as to the future and, therefore, would be of no assistance in the present controversy, which involves only past practices, appellants' argument ignores that fact that this Court specifically ruled that "the question of the reasonableness and legality of the practices of the parties"—i.e., the practices of El Dorado Company and General American—was the administrative question to be determined by the Interstate Commerce Commission. Appellants' argument also ignores this Court's approval of the finding of the Commission in *Use of Privately Owned Refrigerator Cars, supra*. In that case the Commission did not prescribe a general mileage allowance to be published in the railroad tariffs. The finding there dealt with the propriety and legality of payments to shipper lessees in excess of their car rental and any other actual costs, and the finding was that such payments were unlawful. It was of exactly the same character as the finding of the Commission in the present case.

Appellants' contentions on this branch of the case appear to rest upon an underlying misapprehension that the Commission's only authority in the premises was to establish some kind of uniform maximum allowance for the use of

tank cars generally, and that the Commission was not empowered to deal with a particular shipper or with shipper-lessees as a class. But the statute affords no basis for the view that Congress intended so to restrict the discretion and tie the hands of the Commission.

At the time of the movement of the shipments here involved, 1934-1936, Section 15(13), which has not been amended since in any particular of present significance, read as follows:

> "If the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished . . . ."

This language contains no provision or intimation which limits the discretion of the Commission with respect to the determination of reasonable maximum allowances or which requires the Commission to fix a uniform maximum allowance applicable to all, in complete disregard of differing circumstances. The Commission is free to determine reasonable maximum allowances in the light of particular facts and conditions. Otherwise, the purpose of Section 15(13) would be thwarted.

With respect to allowances to shipper-owners or to shipper-lessees, the Commission is under no obligation to fix so-called uniform allowances. To the extent that such allowances are fixed for shipper-owners, they are due not to limitations of the Commission's authority but to practical considerations which have no application to allowances for shipper-lessees.

A special classification for shipper-lessees, and the fixation of the maximum allowance to be received by a shipper-lessee as the cost to him of furnishing the cars in which his

shipments move, are not only well within the discretion of the Commission, but are essential to the effective performance of the Commission's duty with respect to the prevention of rebates, concessions, preferences and discriminations.

If this discretion were not vested in the Commission, it would be powerless to interfere with practices under which a shipper-lessee would obtain unconscionable profits from the simple device of renting private cars for use in moving his shipments. Nothing could better illustrate the possibilities in this connection than the present case. During the period 1926 to 1933, before the decision of the Commission in *Use of Privately Owned Refrigerator Cars, supra*, appellants received allowances for the use of their leased cars which exceeded rental payments by $161,684.94, while for the period 1934 to 1936 corresponding allowances would amount to $64,232.03* (*Allowances for Privately Owned Tank Cars, supra*, at page 375; R. 234A, 235.)

The opinion of this Court in *General American Tank Car Corporation* v. *El Dorado Terminal Co., supra*, makes it plain that in determining reasonable maximum allowances under Section 15 (13) the Commission is under no mandate or obligation to adopt a uniform rule and to ignore special circumstances. We have heretofore considered that opinion and quote here only the following language on Page 432 (308 U. S.):

> "The Circuit Court of Appeals, without supporting evidence in the record as to any specific items, said that there are obviously other expenses which the shipper must bear over and above the actual rental paid. *If this were so, the reflection of those expenses, as well as the rental itself, in the allowance paid by the carrier to the shipper for the use of the latter's cars, would be a matter for the administrative judgment of the Commission* and not for determination by a court." (Emphasis supplied.)

* Of this amount, $9,212.25 accrued prior to July 1, 1934, and has been paid over to appellants. The remaining $55,019.48 they seek to recover.

The above quoted language, together with many other statements in the Court's opinion, completely answers any contention that the authority of the Commission under Section 15 (13) extends only to fixing so-called "uniform" allowances.

It will not be forgotten, however, that the finding of the Commission in this proceeding concerning allowances to appellants, as shipper-lessees, does not depart from uniformity, so far as allowances to shipper-lessees are concerned. On the contrary, it is in accord with the rule announced in *Use of Privately Owned Refrigerator Cars, supra.*

IV.

The Practice Condemned By The Commission In The Report And Order Here Under Attack Was The Same Practice As That Condemned In the Refrigerator Car Case.

In its report in the proceeding here involved, 258 I. C. C. p. 380, the Commission said of the record that it "shows that the abuses found to exist as to refrigerator cars would measurably exist under the terms of the contract, if such terms were observed", and that hence it approved the principles applied in *Use of Privately Owned Refrigerator Cars, supra,* as related to the situation here involved. That the Commission was sound in holding that the abuses found as to refrigerator cars inhere in the practice provided for in the contract between the El Dorado Company and General American would appear obvious from the very terms of the contract itself, coupled with the absence of any showing by appellants that they assumed or incurred any expense beyond their rental cost for the performance of any service or the furnishing of any facility which it was the duty of the carriers to perform or furnish. It would not appear possible to sustain the appellants here without repudiating the Commission's disposition of the *Refrigerator Car Case.* To do so would, in the judgment of these appellees, seriously and perhaps fatally handicap the Com-

mission in the eradication of abuses incident to the use of private cars. The Commission should be placed under no such handicap, for, as this Court said in *O'Keefe* v. *United States*, 240 U. S. 294, 297, "it is not only within its (the Commission's) power, but the law makes it the duty of the Commission to make orders which shall nullify such practices resulting in rebates or preferences, whatever form they take and in whatever guise they may appear."

V.

The Circumstances That The Payments To Appellees Were Made By The Car Owner, Not By The Rail Carriers, And That Consignees May Have Paid The Freight Are Immaterial.

In line with the principle of *O'Keefe* v. *United States, supra*, it becomes quite immaterial that the payments here involved were made by the car owner and not the rail carriers, and that the freight charges may have been paid by the consignees rather than the shipper-lessee of the cars in question. As the Commission pointed out (258 I. C. C. 376-7), unlawful rebates, concessions from the published tariffs, and discriminations may be brought about by the acts of persons not directly in the relation of carrier and shipper. *Union Pacific R. Co.* v. *United States*, 313 U. S. 450; *Spencer Kellogg & Sons* v. *United States*, 20 F. (2d) 459. In the case first cited, this Court said (p. 469):

> "In prior sections of this opinion, it has been pointed out that any concession by any person or corporation in respect to transportation is forbidden by the federal transportation statutes."

And in *Spencer Kellogg & Sons* v. *United States, supra*, cited with approval in *Union Pacific R. Co.* v. *United States, supra*, at p. 463, the Court said (p. 461):

> "Congress did not intend to limit the offense described in it (the Elkins Act) to cases of collusion between the carrier and shipper. What was done by the plaintiff in error is not in dispute, and therefore the

question is whether what was done constitutes an offense by this plaintiff in error, even though it were not established to have been done in collusion with a carrier or with its knowledge or consent. The law was intended to reach either individuals or corporate entities who contribute knowingly and understandingly to a rebate or concession by any manner or device, and the relation which the culprit bore to the carrier is not necessary as a foundation upon which to rest responsibility."

The contention of appellants that no rebate could have resulted to them because the freight was paid by the consignees is fully answered by the report of the Commission, 258 I. C. C., at p. 377, where it is pointed out that the circumstance of consignee payment "does not make it impossible that the Oil Company, as consignor, may have been a party to an unlawful concession from the published rate if paid an undue amount for the service it actually performed." Appellants were shippers over the lines of rail carriers in interstate commerce and whether the freight charges on particular shipments were paid by appellants or by consignees is immaterial. Any concession or rebate to appellants as shippers is forbidden. Undue advantage would accrue to them in their ability by reason of the unlawful rebate to sell their product lower, or if they did not avail themselves of such opportunity the amount of the rebate would enrich them to that extent. See *Northern Central R. Co.* v. *United States*, 241 Fed. 25, 28; *Elgin, J. & E. Ry. Co.* v. *United States*, 253 Fed. 907, 911.

VI.

Conclusion.

In conclusion, we would point out that appellants have had a fair and just hearing before the Commission. They were permitted to present all the evidence they desired to offer. The matter was thoroughly briefed and argued. The Commission's determination of the administrative question is fully supported by the record and is strictly in line with its decision in *Use of Privately Owned Refrigerator Cars*,

supra. This Court has said that "the inquiry into the lawfulness of the practice is one peculiarly within the competence of the Commission." It is respectfully submitted that the action of the Commission in the premises should not be disturbed by the Court.

Respectfully submitted,

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Washington, D. C.
March 18, 1946.